Supreme Court, U.S.
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No. 93-937

In The

SUPREME COURT OF THE UNITED STATES

October Term 1993

J. MORRIS ANDERSON,

Petitioner,

v.

STEERS, SULLIVAN, MCNAMAR & ROGERS and RUTH E. MYER, Individually,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

Whether the Court of Appeals for the Seventh Circuit erred in affirming the district court's requirement that Petitioner post a bond to secure the payment of costs where the litigation appeared frivolous, Plaintiff was unrepresented, Plaintiff failed to establish that he had the wherewithal to pay costs should he lose on the merits and, in fact would pay, or that the bond was an unreasonable estimate of the costs likely in a lawsuit of that nature, especially when no issue was preserved for appeal.

Whether the Court of Appeals for the Seventh Circuit erred in imposing sanctions against Petitioner for a frivolous appeal when the Petitioner argued that the district court "teamed up" with the Respondents to deny Petitioner his day in Court and made no effort to show that he could not post a bond, that a case of this sort was unlikely to produce taxable costs of $10,000 or more, or that federal courts lack inherent authority to require bonds to secure contingent claims for costs, and the Petitioner had not preserved any issue for appeal.

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION

Respondents, Steers, Sullivan, McNamar & Rogers and Ruth E. Myer, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Seventh Circuit imposing damages against Appellant for a frivolous appeal and affirming the dismissal of the case by the District Court for failure of Plaintiff to comply with the District Court's orders.

COUNTER STATEMENT OF THE CASE

Clarification of Facts in Petitioner's Statement

Pursuant to Sup. Ct. R. 15.1, this response clarifies erroneous statements of fact contained in the Petition.

Petitioner has represented that the allegations of his Complaint are factually correct. Most of these allegations have been denied by Respondents' Answer. Contrary to Petitioner's allegations in his statement of the case, no motion for summary judgment was ever presented to the district court, nor did that court grant or deny on its own motion any partial summary judgment.

This action was brought by Petitioner in the United States District Court for the Southern District of Indiana, Indianapolis Division, by the filing of a 26 page Complaint in five (5) counts on June 29, 1990. The Complaint attempted to allege trademark infringement (Count I), interference with business and contractual relations (Count II), interference with business and contractual relations (Count III), negligence (Count IV) and misuse of legal procedure (Count V), Complaint, Petitioner's Appendix L at 36.

On August 20, 1990, Defendants filed their "Motion to Dismiss and to Strike Plaintiff's Complaint", which Motion was granted in part and denied in part on December 6, 1990, by the magistrate judge. Thereafter, the magistrate judge issued his "Amended Dismissal of Counts I and V of Plaintiff's Complaint" on December 10, 1990.

Also on August 20, 1990, when Respondents filed their "Motion to Dismiss and to Strike", Respondents filed

"Defendants' Motion Requesting Plaintiff to Post an Original Bond for Costs," alleging that Petitioner was a resident of the State of Pennsylvania and did not possess title to any real estate in the state of Indiana, and that Respondents previously had incurred expenses and attorneys fees in dismissing for lack of jurisdiction a previous action regarding the same allegations filed by the same Petitioner in the United States District Court for the Eastern District of Pennsylvania, and that they believed Petitioner's action in the Southern District of Indiana was frivolous. Motion, Respondents' Appendix at App. 1. Following a pre-trial conference which addressed the issue, on May 26, 1992, the magistrate judge entered his Order requiring Petitioner to post a bond for costs or additional security for costs in the sum of $10,000. Order on Defendants' Motion Requesting Plaintiff to Post and Original Bond for Costs, Respondents' Appendix at App. 3. (The copy of the Order contained in Petitioner's Appendix C is erroneous).

Plaintiff did not post any bond, take any action, or file any Motion to Reconsider that Order. Therefore, on June 30, 1992, Respondents filed their "Motion to Dismiss". On July 10, 1992, Petitioner filed a response to the Motion to Dismiss and a Memorandum. On July 16, 1992, the Court dismissed the cause with the following language:

> The Defendants observe that while the Magistrate Judge's Order to post bond did not specify a time within which the Plaintiff was to comply, "a reasonable time to comply would be thirty (30) days, which time has now passed." Motion to Dismiss, p. 1. The Court agrees, and concludes that this cause should be DISMISSED. This cause will be reopened if the Plaintiff files a bond for costs or additional

> security for costs in the sum of $10,000 within ten (10) days from the date of his receipt of this Order.
>
> IT IS SO ORDERED this 16th day of July, 1992.

Order Dismissing Cause, Petitioner's Appendix O at 92. Thereafter, on July 24, 1992, Plaintiff filed his "Objection and Motion to Reconsider the Ruling of July 16, 1992." Plaintiff's Objection and Motion to Reconsider the Court's Ruling of July 16, 1992, Petitioner's Appendix N at 82.

On August 3, 1992, Respondents filed their Response to Plaintiff's Objection and Motion to Reconsider the Court's Ruling of July 16, 1992. Following the death of Judge Noland, the cause was reassigned to Judge Tinder who entered his Order denying Plaintiff's Motion to Reconsider on October 9, 1992. In denying Plaintiff's Motion to Reconsider the dismissal, Judge Tinder found:

> Plaintiff's only argument is that posting such a bond would be onerous and that the amount is excessive. Neither of these arguments were timely raised and the time for raising same has long expired. Plaintiff has failed to show why such bond would be onerous or the amount excessive. Costs in actions such as this often exceed fifteen thousand to twenty thousand dollars and the amount set was carefully considered in light of the nature and status of the case.

Entry, Petitioner's Appendix P at 93.

Petitioner then filed an appeal with the United States Court of Appeals for the Seventh Circuit. In his Appellant's Brief, rather than cite any authority for his case, Petitioner accused the district court and the Defendants' counsel of conspiring to dismiss his case which he claimed to be meritorious. Appellant's Brief, Petitioner's Appendix Q at 108-109.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition presents no conflict with any decision of the United States court of appeals for any other circuit, no special or important questions and no departure from the accepted and usual course of judicial proceeding nor sanction of such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

A. Petitioner has waived any issue with regard to the amount or necessity for a bond or other security for costs.

The magistrate judge entered his order requiring Petitioner to post a $10,000 bond on May 26, 1992. Petitioner did not request reconsideration of that order, but chose to ignore the same until Respondents moved the district court for an order of dismissal. Even after the district judge dismissed the cause with leave for automatic reinstatement upon posting of the bond, Plaintiff did not comply with the court's order. Rule 72(a), Fed. R. Civ. P., provides in pertinent part as follows:

> Within ten (10) days after being served with a copy of the magistrate's order, a party may

> serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate's order to which objection was not timely made.

Although this Court has not had occasion to review this rule, courts of appeal which have addressed the issue have uniformly held that a party's failure to make objections within ten (10) days after being served with the magistrate's order is a waiver of the issue. *McKeever v. Block*, 932 F.2d 795 (9th Cir. 1991); *Singletary v. B.R.X., Inc.*, 834 F.2d 1025 (5th Cir. 1987); *Abeshouse v. Ultragraphics, Inc.*, 754 F.2d 467 (2nd Cir. 1985). Petitioner's failure to object to the magistrate judge's order and seek reconsideration by the district judge was a waiver of his claims that the amount of the bond was excessive, and that he should not be required to post any bond or other security for costs.

Petitioner also urges that the imposition of a bond requirement amounts to a denial to him of equal protection as guaranteed by the Fourteenth Amendment. Petition at 32. This argument has never been presented to either the district court or to the Seventh Circuit, but is first raised in his Petition. This issue should be considered as waived. *Youakim v. Miller*, 425 U.S. 231 (1976).

For the foregoing reasons, Petitioner has failed to preserve any issue regarding the requirement for a bond or other security for costs.

B. The decision of the Seventh Circuit correctly held that the district court had inherent power to take reasonable measures to insure that the costs assessed in the case would be paid.

While Respondents have difficulty in following the arguments of Petitioner, the thrust of his presentation appears to be that the opinion of the Seventh Circuit conflicts with *Farmer v. Arabian American Oil Co.*, 285 F.2d 720 (2nd Cir. 1960) and *Aggarwal v. Ponce School of Medicine*, 745 F.2d 723 (1st Cir. 1984). Petitioner also attempts to distinguish cases relied upon by the Seventh Circuit, namely: *Ehm v. Amtrak Board of Directors*, 780 F.2d 516 (5th Cir. 1986); *A & M Gregos, Inc. v. Robertory*, 70 F.R.D. 321 (E.D. Pa. 1976); and *State Wide Enterprises, Inc. v. United States Gypsum Co.*, 238 F.Supp. 604 (E.D. Mich. 1965).

1. There is no conflict among the circuits on the inherent power of a district court to require a party who is not indigent to post a bond or give other security for costs.

Although the district court's requirement for a bond in *Farmer v. Arabian American Oil Co.*, 285 F.2d 720 (2nd Cir. 1960) was reversed, the circuit court noted that the bond was not sought until four years after the action was brought and after a previous appeal to that circuit court revealed a *prima facia* case for the plaintiff. *Id.* at 721 - 722. Further, the plaintiff had showed conclusively that he could not provide the collateral required by security companies before furnishing the bond. *Id.* at 722. In doing so, the Second Circuit distinguished its prior decision of *Miller v. Town of Suffield*, 249 F.2d 16 (2nd Cir. 1957), cert. den., 356 U.S. 978 (1958), which affirmed dismissal of an action brought by a

persistent suitor without valid claim upon non-compliance with an order for a "moderate bond for costs", which was "justified in view of the background of prior litigation". *Id.* at 721. Thus, the *Farmer* case presents no conflicts as to the inherent power of the district court.

Although no federal statute specifically authorizes a district court to require a bond or other security for costs, 28 U.S.C. §1915(a) does provide that payment of costs or fees or a bond to secure the same may not be required where the party makes an affidavit that "he is unable to pay such costs *or give security* therefor" (emphasis added). By implication, the district court may require such a bond when no such affidavit is made.

2. There is no conflict among the circuits on the facts presented in this case which justified the imposition of a bond requirement on Petitioner.

The *Farmer* case presents no conflict with this case on the facts which it addressed. Although the district court in the case at bar overruled Respondents' Motion to Dismiss pursuant to Fed. R. Civ. P. Rule 12(b)(6) as to Counts II, III and IV because Petitioner's "confusing" Complaint stated causes of action as to interference with business and contractual relationships and negligence, the Seventh Circuit found the character of Petitioner's litigation to be "apparently frivolous". Opinion, Petitioner's Appendix A at 3. Further, Plaintiff has never made an affidavit that he could not post bond or that he was indigent and entitled to proceed without the payment of *costs* or giving security therefor pursuant to 28 U.S.C. §1915(a). See also, 28 U.S.C. §1914, which allows the district court to require the prepayment of *fees*.

Petitioner's reliance on *Aggarwal v. Ponce School of Medicine*, 745 F.2d 723 (1st Cir. 1984), is also misplaced. In that case, the court ruled that even in the absence of a local rule, the district court has inherent power to require security for costs when required by the circumstances of the case. *Id.* at 726. Unlike the Petitioner in the instant case, Aggarwal had filed an affidavit with the district court representing that his only income was a monthly gratuity of $200 from relatives, he had been unable to find gainful employment although he had continued to search for the same, and had only a checking account balance of $350. Ponce School of Medicine did not controvert the affidavit. Additionally Aggarwal had no history of fruitless litigation nor track record of harassment. *Id.* at 728. Accordingly, the court of appeals remanded the case to the district court to reexamine the appropriateness of a cost bond in the case. No conflict exists between the *Aggarwal* decision and the decision of the Seventh Circuit in this case. As noted by the district judge in reviewing Plaintiff's Motion to Reconsider the Order of Dismissal,

> Plaintiff has failed to show why such bond would be onerous or the amount excessive. Costs in actions such as this often exceed fifteen to twenty thousand dollars and the amount set was carefully considered in light of the nature and status of the case.

Entry, Petitioner's Appendix P at 94.

Petitioner has also alleged that the decision of the Seventh Circuit is not supported by the following cases: *Ehm v. Amtrak Board of Directors*, 780 F.2d 516 (5th Cir. 1986); *A & M Gregos, Inc. v. Robertory*, 70 F.R.D. 321 (E.D. Pa. 1976); and *State Wide Enterprises, Inc. v. United States*

Gypsum Co., 328 F.Supp. 604 (E.D. Mich. 1965). Petitioner's argument appears to be that because those cases involved a determination by the court that either those plaintiffs' actions involved a good chance that the defendants would ultimately prove bad faith (*A & M Gregos*) or the plaintiff's case lacked merit (*Ehm* and *State Wide Enterprises*), and prior unsuccessful litigation (*Ehm*), they are somehow inapposite to the case at bar. However, the district court's ruling in this case that Petitioner's Complaint stated a claim upon which relief could be granted is not tantamount to a finding that the case had merit and was not being pursued in bad faith. Rather, the Court of Appeals characterized the litigation by Petitioner as "apparently frivolous." Thus the district court was ruling upon the mere basics of pleading, while the court of appeals was looking at the probability of recovery on those allegations. Certainly the decision of the Seventh Circuit in the case at bar is consistent with *Ehm*, *A & M Gregos* and *State Wide Enterprises*.

Petitioner next seems to argue that because parts of his Complaint were dismissed for failure to state a claim, little in the way of cost would be incurred, thus justifying a lower bond. Petition at 15. The bond was not established until after two Counts of Plaintiff's Complaint had been dismissed, and the District Judge specifically found that costs in cases of this nature often exceeded fifteen to twenty thousand dollars. Entry, Petitioner's Appendix P at 94. Petitioner has never shown either the district court or the court of appeals that costs would not be high. In fact, a review of the Plaintiff's Complaint, the Petitioner's Brief in the court of appeals and the Petition before this Court clearly indicates how disjointed Petitioner's arguments are and how difficult they are to follow, let alone understand. Petitioner's efforts seem calculated to require more time, effort and expense to

decipher and refute, rather than less. Neither the district court nor the court of appeals erred in this respect.

For the foregoing reasons, Petitioner has failed to show any grounds for issuing a Writ of Certiorari to the Seventh Circuit with regard to the issue of the cost bond.

C. There is no conflict between the circuits regarding the Petitioner's frivolous appeal to the Seventh Circuit which warrants granting the Petition.

Petitioner next urges that the decision by the Seventh Circuit conflicts with another Seventh Circuit decision, namely *Bacon v. American Federal of State, County & Municipal Employees Council*, 795 F.2d 33 (7th Cir. 1986) because the dissenting opinion in that case indicated that one judge was unable to conclude that that appeal was brought in bad faith rather than brought ineptly. Plaintiff's reliance upon a dissenting opinion in the same circuit does not constitute grounds for the granting of certiorari pursuant to Sup. Ct. R. 10.1.

Plaintiff has urged that his appeal could not be frivolous because the district judge did not find that his case-in-chief was frivolous. Petition at 19. To be sure, Petitioner is *pro se*. The Seventh Circuit made allowance in that respect for Petitioner, however. Opinion, Petitioner's Appendix A at 4. The case before the Seventh Circuit was a classic example of the reason for imposing sanctions for a specious appeal. Because Petitioner did not seek reconsideration of the Magistrate Judge's Order requiring a bond of $10,000, no issue was preserved for appeal. Fed. R. Civ. P. 72(a). Petitioner failed to comply with the Rules of the Seventh Circuit and the Federal Rules of Appellate Procedure. Petitioner's Brief before that court cited no authority and no

cogent argument. As noted by the Seventh Circuit in its opinion, the Petitioner made no effort to show that he could not post the bond, that the case was unlikely to produce taxable costs of $10,000 or more, or that Federal Courts lack inherent authority to require bonds to secure a contingent claim for costs. Opinion, Petitioner's Appendix A at 4. No valid purpose was furthered by the prosecution of Petitioner's appeal.

Petitioner now urges that the decision of the Seventh Circuit conflicts with the decision of the Fifth Circuit in *Ehm v. Amtrak Board of Directors*, 780 F.2d 516 (5th Cir. 1986). See Petition at 8 - 12. It appears to be Petitioner's argument that because the issue in *Ehm* was a novel one for the Fifth Circuit, he is being treated unfairly when the Seventh Circuit, also finding that Petitioner's issue was novel for that circuit, imposed sanctions. It is respectfully submitted that there is no conflict because of grace granted by the Fifth Circuit to an appellant who apparently made a sufficient legal argument, although the Court cautioned that "even judicial patience is not inexhaustible." *Id.* at 518.

Petitioner urges that the Seventh Circuit erroneously relied on *McNeil v. United States*, 261 U.S.L.W. 4468 (May 17, 1993), but does not indicate why this Court's statement that the Court has "never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel" does not apply to his case. Petitioner merely asserts, "In the case at bar, plaintiff/petitioner, *pro se* did not make any fatal mistakes period." Petition at 20.

Petitioner next urges that the imposition of sanctions for a frivolous appeal violates the spirit of the "cruel and unusual punishment clause of the Eighth Amendment to the

Constitution" because he appeared *pro se*. Petition at 21-24. However, the protection of the Eight Amendment against cruel and unusual punishments is not applicable to purely civil penalties. *Zwick v. Freeman*, 373 F.2d 110 (2nd Cir. 1967) cert. den., 389 U.S. 835. In any event, the sanction serves a valid public purpose similar to that of a sanction for violation of Fed. R. Civ. P. 11.

Petitioner next urges that he was unable to acquire a lawyer to represent him because of the cost involved. He does not attempt to show how his decision to proceed *pro se* excuses his conduct. As previously indicated, his choice to proceed without the benefit of counsel does not exempt him from compliance with the rules of civil procedure. *McNeil*, *supra*.

Petitioner next urges that the district court and the Seventh Circuit were both in error in finding that Petitioner did not show he could not afford to post a bond. Petition at 25-29. Other than argumentative above and self-serving conclusions, Petitioner has not established facts to show he could not post a bond as did the plaintiff in *Aggarwal v. Ponce School of Medicine*, *supra*.

Petitioner next makes a vague reference to denial of equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution, citing *Coady v. Aguadillia Terminal, Inc.*, 456 F.2d 677 (1st Cir. 1972). Petition at 32. Petitioner does not explain how that constitutional provision applies to his case. Accordingly, such arguments should be deemed waived. See *Gulf, Mobile and Ohio Railroad Co. v. Thornton*, 294 F.2d 104, 108 (8th Cir. 1961).

The Petitioner's next assertion that "the Seventh Circuit stated two reasons the Petitioner should have been required to

post a $10,000 bond: (i) frivolous character of the litigation; and (ii) the fact that Petitioner was unrepresented," (citation omitted), Petition at 32, mis-states the court's opinion. The court did not base its decision solely on the frivolous character of the litigation and the fact that he was unrepresented. The Court ruled that those issues made the Respondents' Motion for the requirement of a bond a plausible one. However, the court went on to say:

> And the Plaintiff failed to establish to the reasonable satisfaction of the district court either that he has the wherewithal to pay costs should he lose on the merits and that in fact he would pay, or that $10,000 is an unreasonable estimate of the costs likely in a lawsuit of this character.

Opinion, Petitioner's Appendix A at 3.

Finally, Petitioner urges that the law of equity should somehow protect him, even if he did not make the most eloquent pleading of his case. He continues to assert that he must have done everything required because neither the district court nor the Seventh Circuit pointed out any violation of procedural rule. Petition at 36. Before the district court and before the Seventh Circuit, Petitioner made no effort to cite any authority in support of his position, but spewed words across the page with great fury. He failed to present to the district court or to the Seventh Circuit any cogent argument. Petitioner did libel the district court, however, by alleging that the district court "did in fact team up with Appellees, who are officers of that Court and impose a bond upon Plaintiff to kick him out of Court -- which it did." Petitioner further alleged in his Brief before the Seventh Circuit that because the district court had no meritorious means of dismissing his cause, it

imposed a $10,000 bond to serve the same purpose. See Brief of Appellant, Petitioner's Appendix Q at 108-109.

For the foregoing reasons, Petitioner has failed to show any grounds for issuing a Writ of Certiorari to the Seventh Circuit regarding the issue of sanctions imposed against him for a frivolous appeal.

CONCLUSION

The Seventh Circuit correctly affirmed the district court's requirement that Petitioner post a bond to secure the payment of costs and properly imposed sanctions against Petitioner for a frivolous appeal. Accordingly, the Petition for Writ of Certiorari should be denied.

Date: January 13, 1994

Respectfully submitted,

Michael R. Franceschini

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

CIVIL ACTION NO.: IP901531C

J. MORRIS ANDERSON,

Plaintiff,

v.

STEERS, SULLIVAN, MCNAMAR & ROGERS,
and RUTH E. MYER,

Defendants.

DEFENDANTS' MOTION REQUESTING PLAINTIFF TO POST AN ORIGINAL BOND FOR COSTS

COME NOW Defendants, by counsel, under Rules 3 and 4 of the Rules of the United States District Court of the Southern District of Indiana, and move the court to order Plaintiff to file a bond for costs or additional security for costs in the sum of $10,000.00 or in such an amount and so conditioned as it may designate. Defendants request filing of such a bond for the following reasons:

1. Plaintiff is a resident of Philadelphia, Pennsylvania and does not possess title to any real estate in the State of Indiana.

2. Defendants previously incurred expenses and attorneys fees in dismissing for want of jurisdiction a previous action regarding the same allegations filed by the same Plaintiff in the United States District Court for the Eastern District of Pennsylvania.

3. Without the posing [sic] of said bond, Defendants will unlikely be able to recover expenses and attorneys fees in this cause of action which Defendants believe to be frivolous and without merit in fact or law.

Respectfully submitted,

/s/ Michael R. Franceschini

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

CIVIL ACTION NO.: IP901531C

J. MORRIS ANDERSON,

Plaintiff,

v.

STEERS, SULLIVAN, MCNAMAR & ROGERS, and RUTH E. MYER,

Defendants.

ORDER ON DEFENDANTS' MOTION REQUESTING PLAINTIFF TO POST AN ORIGINAL BOND FOR COSTS

COME NOW Defendants, by counsel, and having filed their Motion Reuqesting [sic] Plaintiff to Post and [sic] Original Bond for Costs, said Motion being in the following words and figures, to-wit:

(H.I.)

The Court being duly advised finds that the same should be granted.

IT IS THEREFORE ORDERED that Plaintiff, J. Morris Anderson, is ordered by this Court to file a bond for costs or additional security for costs in the sum of $10,000.00.

May 26, 1992
Date

/s/ J. Patrick Endsley
Magistrate Judge, United States District Court for the Southern District of Indiana